

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	CRIMINAL NO: 99-416
	:	
	:	
KEVIN TOLBERT	:	

GOVERNMENT’S CHANGE OF PLEA MEMORANDUM

I. INTRODUCTION

On July 20, 1999, a two (2) count indictment was returned by the grand jury against defendant Kevin Tolbert. Counts One (1) and Two (2) charged the defendant with possession of a firearm by a convicted felon in violation of Title 18, United States Code, Section 922(g)(1) on two separate occasions.

II. TERM OF THE PLEA AGREEMENT.

A plea agreement has been reached between the defendant and the government and is incorporated by reference (attached as Exhibit A). In summary, the agreement provides that:

1. The defendant will plead guilty to Count One of the indictment which charges him with:
  - a. possession of a firearm by a convicted felon in violation of Title 18, United States Code, Section 922(g)(1).
2. The charges stem from the defendant’s possession of a firearm, that is, a Smith & Wesson .40 caliber semi-pistol, serial number #1936059 which was loaded with

four (4) rounds of ammunition on or about February 1, 1999 near the vicinity of 58th and Vine Streets in Philadelphia, PA..

3. The defendant agrees to pay the special assessment in the amount of \$100.00 at the time of sentencing.

4. The defendant agrees to voluntarily abandon all rights and claims to the firearms and ammunition seized from him on December 29, 1998 and February 1, 1999 and to allow the Bureau of Alcohol, Tobacco & Firearms to dispose of the firearms and ammunition as it deems appropriate. In connection with this agreement, the defendant agrees that he will execute the attached Notice of Abandonment of Property Form on or before the date of this agreement.

5. The defendant agrees and understands that, at the time of sentencing, the government will:

- a. move to dismiss Count 1 of the Indictment as to this defendant;
- b. make whatever sentencing recommendation as to imprisonment, fines, forfeiture, restitution and other matters which the government deems appropriate; and
- c. comment on the evidence and circumstances of the case, bring to the Court's attention all facts relevant to sentencing and to the character and any criminal conduct of the defendant, address the Court regarding the nature and seriousness of the offense, respond factually to questions raised by the Court and correct factual inaccuracies in the presentence report or sentencing record, and rebut any statement of facts made by or on behalf of the defendant.

6. Nothing in this agreement shall limit the government in its comments in, and responses to, any post sentencing matters.

7. The defendant understands, agrees and has had explained to him by counsel, that the Court may impose the following statutory maximum sentence: **Count Two - Section 922(g)(1)** (possession of a firearm by a convicted felon) 10 years of imprisonment, a 3 year period of supervised release, a fine of \$250,000.00, and a special assessment of \$100.00;

**Total Maximum Sentence:** 10 years of imprisonment, a fine of \$250,000.00, a 3 year period of supervised release, a special assessment of \$100.00.

The defendant understands that supervised release may be revoked if its terms and conditions are violated. When supervised release is revoked, the original term of imprisonment may be increased by two (2) years in the case of **Class C** felony. Thus, a violation of supervised release increases the possible period of incarceration and makes it possible that the defendant will have to serve the original sentence, plus a substantial additional period, without credit for the time already spent on supervised release.

8. The defendant may not withdraw his plea because the Court declines to follow any recommendation, motion or stipulation by the parties to this agreement. No one has promised or guaranteed to the defendant what sentence the Court will impose.

9. Pursuant to Section 6B1.4 of the Sentencing Guidelines, the parties enter into the following stipulations under the Sentencing Guidelines Manual effective November 1, 1998. It is understood and agreed that: (1) the parties are free to argue the applicability of any other provision of the Sentencing Guidelines, including offense conduct, offense characteristics, criminal history, adjustments and departures; (2) these stipulations are not binding upon either the Probation

Department or the Court; and (3) the court may make factual and legal determinations that differ from the following stipulations that may result in an increase or decrease in the Sentencing Guidelines range and the sentence that may be imposed:

- a. The parties agree and stipulate that on or about February 1, 1999 in the Eastern District of Pennsylvania, the defendant possessed a firearm, that is, a .40 caliber Smith & Wesson semi-automatic pistol which was loaded with four (4) rounds of ammunition.
- b. The parties agree and stipulate that the pistol he possessed, as well as the ammunition was manufactured in a state other than the Commonwealth of Pennsylvania and, therefore, traveled in interstate commerce before arriving in the Commonwealth of Pennsylvania;
- c. The parties agree and stipulate that at the time that he possessed the firearm, he had previously been convicted of a crime in the Commonwealth of Pennsylvania which was punishable by more than a year of imprisonment in Case Number 90/12-3164 1/1.
- d. The parties agree and stipulate that the defendant's base offense level is 24 pursuant to U.S.S.G. Section 2K2.1(a)(2) because he has two prior convictions involving crimes of violence.

- e. The parties agree and stipulate that as of the date of this agreement, the defendant has demonstrated acceptance of responsibility for a two-level downward adjustment under U.S.S.G. Section 3E1.1(a).
- f. The parties agree and stipulate that as of the date of this agreement, the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying the government of his intent to plead guilty making him eligible for an additional one-level downward adjustment under U.S.S.G. Section 3E1.1(b).

### III. STATUTE INVOLVED

#### A. Title 18, United States Code Section 922(g)(1)

“[i]t shall be unlawful for any person. . . (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition. . .”.

To establish a violation of Section 922(g)(1), the government must present evidence which proves beyond a reasonable doubt that the defendant **(a)** possessed a firearm; **(b)** the firearm traveled in, or affected, interstate commerce; and **(c)** the defendant had previously been convicted of a crime punishable by imprisonment for more than one year at the time he possessed the firearm.

### IV. MAXIMUM SENTENCE

The maximum sentence for violation of Section 922(g)(1) is 10 years imprisonment, three (3) years of supervised release, a \$250,000.00 fine, and a \$100.00 special assessment.

V. EVIDENCE IN SUPPORT OF THE ALLEGATIONS

The government's evidence would prove the following facts, among other facts, if this case proceeded to trial.

1. On February 1, 1999, Philadelphia Police Officers Robert Penn, Varick Johnson and Terence Erwin were in a patrol car near the vicinity of 52nd & Market Street. The three officers saw the defendant drive through an intersection without stopping at 52nd & Vine Streets.

2. Having witnessed a traffic violation, the officers stopped the defendant's car and asked the defendant to produce his driver's license and registration. Unable to do so, the defendant told the officers that the car belonged to his aunt.

3. While talking to Officer Penn, the defendant started reaching into various pockets on his clothing. Officer Penn's partner – Officer Johnson who was standing on the passenger side of the car in a position where he was able to see the defendant through the passenger window – told the defendant to “keep his hands on the steering column.”

4. In response to Officer Johnson's warning, the defendant opened his hands and showed Officers Penn and Johnson several packet of a substance that the officers concluded were drugs based on their experience and training as police officers.

6. After seeing what appeared to be drugs in one of the defendant's hands, the officers told the defendant to get out of the car and to go to the rear of his vehicle where he was frisked by Officer Johnson. During the frisk, Officer Johnson found a .40 caliber Smith & Wesson handgun in the defendant's rear waistband.

7. After Officer Penn testified at defendant's state court preliminary hearing, the defendant stopped Officer Penn in the hallway of the courthouse and told him that he was “sorry

because he was high on that stuff” to which Officer Penn told him that he [Officer Penn] could not talk to the defendant until the case was over.

9. Testimony from an ATF agent would be introduced which would show that the .40 caliber Smith & Wesson seized from the defendant was not manufactured in the Commonwealth of Pennsylvania and therefore traveled in interstate commerce before its arrival in the Commonwealth.

10. The government would introduce into evidence a certified copy of defendant’s conviction for robbery in case number 90/12-3164 1/1 for which he was sentenced on March 26, 1999 to a term of imprisonment of not less than one and one-half (1 and ½) to not more than five (5) years of imprisonment.

Respectfully submitted,  
MICHAEL R. STILES  
United States Attorney

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J. HUNTLEY PALMER JR.  
Chief, Firearms & Arson Section  
Assistant United States Attorney

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FLOYD J. MILLER  
Assistant United States Attorney

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